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No. 97-779

In the Supreme Court of the United States

OCTOBER TERM, 1997

FRIENDS OF THE VIETNAM VETERANS MEMORIAL, ET AL., PETITIONERS

v.

ROBERT STANTON, DIRECTOR, NATIONAL PARK SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 36 C.F.R. 7.96(k), which generally prohibits the sale of items other than "books, newspapers, leaflets, pamphlets, buttons and bumper stickers" on the National Mall and other federal parks in the National Capital Region, violates the First Amendment as applied to the sale of message-bearing T-shirts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 116 F.3d 495. The opinion of the district court (Pet. App. 12-31) is reported at 899 F. Supp. 680.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1997. Pet. App. 10-11. A petition for rehearing was denied on August 8, 1997. Pet. App. 34. The petition for a writ of certiorari was filed on November 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REGULATION INVOLVED

36 C.F.R. 7.96(k) provides in pertinent part:

> (1) No sales shall be made nor admission fee charged and no article may be exposed for sale [in national parks in the National Capital Region] without a permit except as noted in the following paragraphs.
>
> (2) No merchandise may be sold during the conduct of special events or demonstrations except for books, newspapers, leaflets, pamphlets, buttons and bumper stickers. * * *

STATEMENT

1. The National Park Service (NPS), acting under the direction of the Secretary of the Interior, is responsible for administering the "parks, monuments, and reservations" that make up the national park system. 16 U.S.C. 1, 2. The "fundamental purpose" of the national park system is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1. The NPS is charged with "promot[ing] and regulat[ing] the use" of the national park system "by such means and measures as conform to" this purpose. 16 U.S.C. 1, 1a-1; see *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 290 n.1 (1984).

The Secretary of the Interior is authorized to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." 16 U.S.C. 3.

Acting on behalf of the Secretary, the NPS has promulgated a number of regulations governing the operation of the national parks. Some of those regulations apply generally to all park areas administered by the NPS, while others apply to particular areas. See 36 C.F.R. 1.2.

This case involves regulations governing the use of national park areas in the "National Capital Region." See 36 C.F.R. 7.96. The National Capital Region encompasses the District of Columbia and surrounding jurisdictions in the Washington metropolitan area. See 36 C.F.R. 7.96(a). The national parks and monuments in that region include a number of highly popular and heavily visited sites, such as the National Mall, the Washington Monument, the Lincoln and Jefferson Memorials, and the Vietnam Veterans Memorial.

Members of the public come to those sites "to examine the historical artifacts of their country and to reflect on monuments to the men and events of its history." *Universal Interpretive Shuttle Corp.* v. *Washington Metro. Area Transit Comm'n*, 393 U.S. 186, 194 (1968). They also use the sites for a variety of recreational, social, and political activities, including demonstrations and rallies. The NPS's regulations are designed to accommodate the diverse, and sometimes conflicting, public uses of the parks and monuments while carrying out the statutory mandate to "conserve the scenery and the natural and historic objects and * * * leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1.

The regulation at issue in this case governs the sale of goods in parks in the National Capital Region. As a general matter, federal law discourages the unnecessary intrusion of commercial activities into the

national park system. Congress has directed that "public accommodations, facilities, and services" within the national park system "should be provided only under carefully controlled safeguards against unregulated and indiscriminate use." 16 U.S.C. 20. Congress therefore has established a policy that "such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas." *Ibid.*

Before 1976, the NPS effectively prohibited all sales of items in parks in the National Capital Region. See 59 Fed. Reg. 25,856 (1994) (discussing history of sales regulations). In 1976, the NPS promulgated a regulation permitting the sale and distribution of newspapers, leaflets, and pamphlets in conjunction with demonstrations and "special events" such as parades, festivals, and fairs. *Ibid.* Demonstrations and "special events" are themselves allowed in most parts of the Mall and other park areas. See 36 C.F.R. 7.96(g).

Beginning in the late 1970s, the NPS began to receive requests from demonstration organizers for permission to sell other items, such as T-shirts, bearing messages directly related to their causes. 59 Fed. Reg. at 25,856. In response, the NPS issued an "enforcement guideline" in the early 1980s that effectively added the sale of message-bearing T-shirts, bumper stickers, buttons, and posters to the existing regulatory exception for the sale of newspapers, leaflets, and pamphlets. *Ibid.*

Unfortunately, the adoption of that enforcement guideline led to a number of adverse consequences

that the NPS did not foresee and that were inimical to the general public's use and enjoyment of the parks in the National Capital Region. The sale of message-bearing T-shirts and other paraphernalia evolved from an ancillary part of transient demonstrations into continuous, ongoing commercial activity, often undertaken for no apparent purpose other than the sales themselves. 59 Fed. Reg. at 25,857, 25,858. A growing number of individuals and groups established year-round T-shirt sales operations on fixed sites that occupied increasing amounts of park space along the Mall, particularly near the Vietnam Veterans Memorial. *Id.* at 25,857. Those sites and their accompanying sales activities led to a "flea market" atmosphere that was inconsistent with the Mall's intended role as a "sanctuary in the midst of a metropolis" (*Universal Interpretive Shuttle*, 393 U.S. at 194) and was particularly at odds with the contemplative atmosphere intended for the Vietnam Veterans Memorial and other national memorials on the Mall. 59 Fed. Reg. at 25,857. In addition, the sales activities damaged the physical surroundings, impaired visitor circulation around memorials, and interfered with the NPS's conduct of interpretive programs. *Ibid.* And because the sale of T-shirts was highly lucrative, competition among vendors produced attempts to manipulate the allocation of available spaces and even led to physical altercations among vendors. *Id.* at 25,857-25,858.

In response to those problems, the NPS issued a notice of proposed rulemaking in 1994. 59 Fed. Reg. at 25,855. Based on "almost ten years of experiences with the current enforcement guideline," the NPS determined that the sales activities permitted by the enforcement guideline had "brought discordant and

excessive commercialism to generally tranquil park settings," "degraded aesthetic values, visitor circulation, interpretive programs, and historic scenes," and "inhibited the conservation of park property by denying visitors the variety of opportunities to safely enjoy park resources." *Id.* at 25,856, 25,858. The NPS therefore proposed to rescind the enforcement guideline, thereby discontinuing the sale of T-shirts, bumper stickers, buttons, and posters in park areas. *Id.* at 25,858.

After receiving public comments, the NPS modified its proposed regulation to permit the continued sale of message-bearing buttons and bumper stickers. 60 Fed. Reg. 17,643 (1995). However, the NPS adhered to its proposal to disallow the sale of T-shirts, because T-shirt sales were found to be uniquely responsible for "the basic problem of commercialization and attendant adverse impacts on park values" on the Mall and in other park areas in the National Capital Region. *Id.* at 17,642. In its final form, the sales regulation generally provides that no merchandise other than "books, newspapers, leaflets, pamphlets, buttons and bumper stickers" may be sold in the park areas of the National Capital Region, including most parts of the Mall, "during the conduct of special events or demonstrations." 36 C.F.R. 7.96(k)(2).

In framing the final terms of the sales regulation, the NPS recognized "the important function [that] park land serves for the 'purposes of assembly, communicating thought between citizens, and discussing public questions.'" 60 Fed. Reg. at 17,641 (quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939)). The NPS undertook to "permit the maximum amount of communicative conduct," including the sale of message-bearing materials, "that is consistent with the

protection of the core park values in the area." *Id.* at 17,642.

The NPS received public comments suggesting a variety of alternatives to a ban on the sale of T-shirts. The NPS gave careful consideration to each of the proposed alternatives, 60 Fed. Reg. at 17,643-17,647, but it determined that "no alternatives exist that would adequately abate or ameliorate the problems caused by sales activities," *id.* at 17,644. For example, the NPS determined that confining T-shirt sales to short-term demonstrations, "while conceptually attractive, is practically impossible to implement" because the NPS does not restrict the length of demonstrations themselves and lacks the means to prevent long-term demonstrations from being disguised (for sales purposes) as a series of short-term ones. *Id.* at 17,644-17,645. Similarly, the NPS determined that prohibiting the use of sales booths and stands or confining sales to designated "sales zones" would create additional problems and would not be adequate to control the adverse impacts of T-shirt sales activities on park visitors. *Id.* at 17,645-17,647.[1]

In deciding to adopt the sales regulation, the NPS noted that the prohibition on T-shirt sales leaves open many alternative avenues of expression for demonstrators. As the NPS explained, "persons and groups remain free to express their views on park land, in long-standing demonstration vigils as well as shorter-term demonstrations. They may continue to use park land to speak, display signs and banners, march, hold

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[1] The NPS also pointed out that it had actually tried some of the suggested alternatives and had found in practice that they "[fell] short of providing adequate protection to park values in the area." 60 Fed. Reg. at 17,643-17,644.

vigils, sell and distribute literature, communicative buttons and bumper stickers, and otherwise communicate their views." 60 Fed. Reg. at 17,643. Moreover, the NPS noted, demonstrators remain free to sell their products, including T-shirts, on property under the jurisdiction of the District of Columbia that is "convenient to park visitors and [is] located adjacent to Washington's Monumental Core." *Ibid.* Specifically,

> Constitution and Independence Avenues east of 15th Street, NW and all of the north-south streets north of Constitution Avenue and south of Independence Avenue are controlled by the District of Columbia. For many years, demonstration groups have used these areas to sell items not permitted to be sold on NPS areas. Further, the vast majority of park visitors must pass these District streets and sidewalks on their way to the NPS areas.

Ibid.

2. a. Petitioners filed suit in the United States District Court for the District of Columbia in 1995, shortly after the adoption of the new sales regulation. Petitioners are non-profit organizations that engage in a variety of activities, including the sale of message-bearing T-shirts, to inform the public of their programs and beliefs. Petitioners assert that, as applied to the sale of message-bearing T-shirts, the sales regulation violates the First Amendment. Although petitioners' First Amendment claim applies to all park areas in the National Capital Region, it is directed principally at the Mall and the national monuments along the Mall, such as the Vietnam

Veterans Memorial, where petitioners' own activities are concentrated.

While petitioners' suit was pending before the district court, the District of Columbia Circuit issued its decision in *ISKCON of Potomac, Inc.* v. *Kennedy*, 61 F.3d 949 (1995). In *ISKCON*, the court of appeals sustained the constitutionality of the sales regulation with respect to plaintiffs who wished to engage in the sale of audio tapes and religious beads. The court of appeals first determined that the sales regulation is "content neutral" for First Amendment purposes because it controls "the means by which a message may be expressed" but "is not concerned with the content of the message conveyed by the items in question." *Id.* at 955. The court then looked to this Court's decisions in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), and *Clark* v. *Community for Creative Non-Violence*, *supra*, for the constitutional standards governing content-neutral "time, place, and manner" regulations.

Under *Ward* and *Clark*, the First Amendment analysis turns on whether a regulation is "narrowly tailored to serve a significant governmental interest" and whether it "leave[s] open ample alternative channels for communication of * * * information." *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293). The court of appeals in *ISKCON* concluded that the interests served by the sales regulation are substantial ones and that the regulation is narrowly tailored to advance those interests. 61 F.3d at 956-958.[2] The court further concluded that the sales

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[2] In contrast, the court concluded that a separate regulation prohibiting demonstrators from soliciting contributions was not narrowly tailored and therefore violated the First Amendment

regulation leaves demonstrators with "innumerable ways" to convey their messages in and around the Mall and other park areas. *Id.* at 958. The court therefore held that the sales regulation passes constitutional muster under *Ward* and *Clark*.

b. Notwithstanding the intervening decision in *ISKCON*, the district court in this case held that the sales regulation sustained in *ISKCON* violates the First Amendment as applied to the sale of message-bearing T-shirts. Pet. App. 31. On appeal, the D.C. Circuit reversed, holding that the district court's decision "is palpably in conflict with" *ISKCON*. *Id.* at 4.

The court of appeals acknowledged that "the t-shirts in question are message-bearing," thereby bringing them within the ambit of the First Amendment, and that "an expressive item does not lose its [First Amendment] protection simply because it is sold." Pet. App. 7 n.2. Nevertheless, the court pointed out that "the record is replete with evidence that t-shirt sales, even more than the sale of beads and audiotapes, substantially contributed" to the excessive commercialization of the Mall. *Id.* at 6. As a result, "[i]f the Park Service's interests were significant in *ISKCON*, then *a fortiori* they are significant here." *Ibid.*

The court of appeals rejected petitioners' argument that the sales regulation is not tailored narrowly enough. Pet. App. 8-9. The court pointed out that the First Amendment does not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary

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under *Ward* and *Clark*. See 61 F.3d at 955-956. The solicitation regulation is not at issue in this case.

with the competence to judge how much protection of parklands is wise and how that level of conservation is to be attained." *Id.* at 9 (quoting *Clark*, 468 U.S. at 299). Instead, it was constitutionally sufficient that the sales regulation "does not burden substantially more speech than necessary to achieve" its purposes. *Id.* at 8.

The court of appeals also concluded that the sales regulation "leaves open ample alternative means of communication." Pet. App. 8-9. The court of appeals pointed out that, among other things, the sales regulation does not prevent petitioners from distributing their T-shirts to interested members of the public, by either giving the T-shirts away on the Mall "or selling them near the Mall." *Id.* at 6-7. The court noted in this regard that it is "the expression inherent in the transmission of the t-shirt from the seller to the buyer," rather than "the fact that the seller raises money thereby," that brings the transaction within the ambit of the First Amendment. *Id.* at 7.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court therefore is unwarranted.

1. The First Amendment principles that govern petitioners' claims are well settled. As a general matter, the First Amendment protects the right of individuals to speak in public parks and other traditional "public forums." See, *e.g.*, *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Hague* v. *CIO*, 307 U.S. 496, 515 (1939). However, "expressive activity, even in a quintessential public

forum, may interfere with other important activities for which the property is used." *Burson* v. *Freeman*, 504 U.S. 191, 197 (1992) (opinion of Blackmun, J.). Accordingly, expressive activities in public forums are "subject to reasonable time, place, or manner restrictions." *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Such restrictions "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of * * * information." *Ibid.*; *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

In this case, the sales regulation "is not concerned with the content of the message conveyed by the items in question." *ISKCON of Potomac, Inc.* v. *Kennedy*, 61 F.3d 949, 955 (D.C. Cir. 1995); see 60 Fed. Reg. 17,648 (1995) (sales regulation "applies irrespective of the nature of the message presented"). Petitioners therefore do not dispute that the regulation is content neutral. See *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

Nor do petitioners dispute that the sales regulation serves significant governmental interests. In *Clark*, this Court held squarely that the government has a "substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them." 468 U.S. at 296; see *Ward*, 491 U.S. at 797; *One World One Family Now* v. *City & County of Honolulu*, 76 F.3d 1009, 1013 (9th Cir.), cert. denied, 117 S. Ct. 554 (1996). Here, the National Park Service (NPS) determined that the

sale of T-shirts on the Mall and in other park areas in the National Capital Region had resulted in excessive commercialization of tranquil park settings, degraded the appearance of park areas, interfered with visitor circulation and interpretive programs, and inhibited the conservation of park property by denying visitors the opportunity for safe enjoyment of park resources. 59 Fed. Reg. 25,857 (1994). The sales regulation is intended to minimize those harms, and the regulation "has served its purpose." *ISKCON*, 61 F.3d at 957. The regulation therefore furthers significant governmental interests.

The court of appeals correctly held that the regulation is narrowly tailored to serve those interests. The narrow-tailoring requirement applicable to content-neutral time, place, and manner regulations is not a "least restrictive alternative" requirement. See *Ward*, 491 U.S. at 797-798. Instead, it is sufficient that "the means chosen are not substantially broader than necessary to achieve the government's interest." *Id.* at 800. Here, the conduct in which petitioners wish to engage—the sale of T-shirts on the Mall—is precisely the conduct that gives rise to the harms underlying the sales regulation. See 60 Fed. Reg. at 17,642 ("[T]he basic problem of commercialization and attendant adverse impacts on park values is caused by T-shirt sales."). By prohibiting the sale of T-shirts in park areas, the NPS "did no more than eliminate the exact source of the evil it sought to remedy." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). As noted above, the NPS carefully considered a variety of alternatives, some of which had already been tried, but concluded that none would be equally effective in

protecting the park areas from the adverse consequences of T-shirt sales. See p. 6, *supra*.

Petitioners assert (Pet. 20) that alternatives that they submitted to the NPS "would have effectively addressed respondents' asserted interests without the necessity of a total ban" on T-shirt sales in park areas. However, petitioners make no attempt whatsoever to show how or why the NPS erred in finding the proposed alternatives inadequate. Indeed, petitioners do not even describe the alternatives on which they rely. Petitioners' *ipse dixit* hardly suffices to cast doubt on the considered judgment of the NPS, the agency charged by Congress with the task of "conserv[ing] the scenery and the natural and historic objects" of the national parks and "leav[ing] them unimpaired for the enjoyment of future generations." 16 U.S.C. 1. As this Court explained in *Clark*, in rejecting a similar demand to override the NPS's judgment about "how an acceptable level of preservation is to be attained," the First Amendment does not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of parklands is wise and how that level of conservation is to be attained." 468 U.S. at 299.

The court of appeals was also correct in holding that the sales regulation leaves open "ample alternative channels for communication of * * * information." *Clark*, 468 U.S. at 293. As that court explained in *ISKCON*, persons and groups who wish to further political, social, or religious causes on the Mall and in other park areas "may convey information about [their causes] in innumerable ways." 61 F.3d at 958. They are, of course, free to engage in public

demonstrations, including "long-standing demonstration vigils as well as shorter-term demonstrations." 60 Fed. Reg. at 17,643. They are likewise free to discuss their views with interested persons and to disseminate their ideas by selling "any of the traditional print media allowed to be sold in the park areas," such as books, pamphlets, buttons, and bumper stickers. *ISKCON*, 61 F.3d at 958. Finally, the sales regulation does not preclude demonstrators from using message-bearing T-shirts to convey information and ideas, since demonstrators may distribute T-shirts without charge in park areas and may sell them in adjacent areas.[3] In short, the sales regulation leaves petitioners with a wide assortment of means for "communication of the information" that appears on their T-shirts.

Petitioners insist (Pet. 15) that the application of the sales regulation to the sale of their T-shirts "would have a devastating impact on [their] ability to disseminate their political, religious, charitable, and educational messages." However, petitioners offer no record support for that claim. And given the alternative avenues for communication that the sales regulation leaves open, there is no basis to expect such apocalyptic results.

2. In challenging the court of appeals' decision, petitioners focus primarily not on the messages conveyed by their T-shirts, but rather on the funds raised by T-shirt sales. Petitioners argue (Pet. 14-19, 21-23) that the sales regulation is unconstitutional

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[3] Petitioners therefore have no basis for their claim (Pet. 23 n.13) that the sales regulation "fails to provide an alternative *location* where [petitioners] can contact the audience that they would otherwise find in the National Capital [Region] parks."

because it interferes with their ability to earn money in support of their activities.

That argument fails to come to terms with the actual scope and operation of the sales regulation. As noted above, the regulation does *not* prohibit petitioners from engaging in the sale of message-bearing T-shirts. It simply prohibits the sale of such items on the Mall and in other park areas, while leaving petitioners free to engage in sales activities along streets and sidewalks that are immediately adjacent to the parks. As the NPS noted, "the vast majority of park visitors must pass these District streets and sidewalks on their way to the NPS areas," and demonstrators have used these areas for many years to sell items not permitted to be sold on the Mall. 60 Fed. Reg. at 17,643. Moreover, petitioners are free to raise money on the Mall itself by selling books, newspapers, leaflets, pamphlets, buttons, and bumper stickers bearing messages related to their respective causes. See 36 C.F.R. 7.96(k)(2). As a result, the regulation leaves petitioners with ample opportunities to raise funds by selling merchandise to persons visiting the Mall and its monuments.

Because the sales regulation does not prohibit petitioners from engaging in sales activities, either on the Mall or in areas immediately surrounding the Mall, petitioners' arguments about the impact of the regulation on their ability to raise funds miss the mark. For example, petitioners argue (Pet. 22) that, "[w]ithout the ability to sell, * * * petitioners have no way of paying for the literature and T-shirts which they distribute or supporting their respective causes." Since the regulation leaves petitioners free to charge for their literature and their T-shirts, the

regulation simply does not divest them of "the ability to sell."

The precedents on which petitioners seek to rely are irrelevant for the same reason. For example, petitioners cite *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 468 (1995) (*NTEU*), which held that a law broadly prohibiting federal employees from accepting compensation for speeches and articles "impose[d] a significant burden on expressive activity." Unlike the honorarium ban in *NTEU*, however, the sales regulation here does not forbid petitioners from selling their message-bearing T-shirts; it simply regulates the locations where they may engage in such sales. Moreover, unlike the honorarium ban, the sales regulation does not single out speech, but rather applies evenhandedly to a wide range of sales activities, including sales that are undertaken for wholly non-expressive purposes. Cf. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 586-587 n.9 (1983) (First Amendment not violated by "nondiscriminatory taxes" on newspapers); *Breard* v. *City of Alexandria*, 341 U.S. 622, 642-643 (1951).[4]

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[4] *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), also cited by petitioners (Pet. 15), is even farther afield. Unlike the campaign financing statutes at issue in *Buckley*, the sales regulation imposes no restriction whatsoever on the *expenditure* of money by petitioners. Neither does the regulation restrict the expenditure of money by persons who wish to provide financial support to petitioners. They remain entirely free to contribute money to petitioners in support of their causes. As a result, even if petitioners are correct that "contribution serves as a general expression of support" (*Buckley*, 424 U.S. at 21), the sales regulation does not foreclose such expression.

Petitioners are equally mistaken in relying on decisions that have invalidated restrictions on charitable solicitations, such as *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). Petitioners invoke those precedents to argue that they have a First Amendment interest not only in communicating information and ideas, but also in raising money. As the court of appeals correctly pointed out, however, the protected speech at issue in cases like S*chaumburg*, *Munson*, and *Riley* was the information and ideas conveyed by the charitable solicitation itself, not the funds (if any) received in response to the solicitation. See Pet. App. 7. As this Court put it in *Schaumburg*, charitable solicitation "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." 444 U.S. at 632. It is that "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes," rather than the transfer of money from the donor to the charitable organization, that places charitable solicitation "within the protection of the First Amendment." *Ibid.*; *Munson*, 467 U.S. at 959-960.[5]

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[5] *Munson* makes clear that, apart from the speech involved in soliciting charitable contributions, the fundraising activities of charities do not otherwise implicate the First Amendment. The regulation at issue in *Munson* imposed a cap on the percentage of solicited charitable funds that could be devoted to fundraising. While the Court invalidated the regulation, it added that "organizations that have high fundraising costs not

Petitioners suggest that the First Amendment protects their sales activities because they use the sales proceeds, in part, to support political advocacy and other expressive activities. That reasoning, however, proves far too much. It implies that First Amendment protections attach to *any* sales activity the proceeds of which may be devoted to expressive purposes, even if the product being sold is not itself expressive and even if the regulation at issue is a general one that is not tied to the seller's intended use of the proceeds. Under that line of reasoning, petitioners would be entitled to use the Mall as a venue for selling not only message-bearing T-shirts, but also T-shirts that do not bear a message—or any other products, such as handicrafts or baked goods—since the proceeds of such sales, too, could be used to support petitioners' expressive activities. Nothing in this Court's charitable solicitation cases, or any other cases of which we are aware, supports such a result. To the contrary, when an activity does not itself involve expression, government regulation of the activity does not implicate the First Amendment, even if enforcement of the regulation happens to impose an indirect burden on other activities that are themselves expressive. See, *e.g.*, *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 704-707 (1986).

The point, it should be emphasized, is *not* that the sale of message-bearing T-shirts does not implicate First Amendment concerns. The court of appeals held that it does (see Pet. App. 7 n.2), and we do not

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due to protected First Amendment activity"—*i.e.*, not due to the speech involved in solicitation—"should not be heard to complain that their activities are prohibited." 467 U.S. at 966.

contend otherwise.[6] Rather, the point is that the First Amendment comes into play because of the messages that the T-shirts bear, not because of the money that petitioners earn from their sales. As a result, the relevant First Amendment inquiry is simply whether the regulation leaves petitioners with "ample alternative channels for communication of the information" contained on their T-shirts. *Clark*, 468 U.S. at 293. For the reasons set forth above and those given by the court of appeals, it plainly does.

3. Petitioners assert (Pet. 12-13) that the decision below conflicts with *Ayres* v. *City of Chicago*, 125 F.3d 1010 (7th Cir. 1997), and *Bery* v. *City of New York*, 97 F.3d 689 (2d Cir. 1996), cert. denied, 117 S. Ct. 2408 (1997). However, both *Ayres* and *Bery* are readily distinguishable from the present case.

In *Ayres*, the Seventh Circuit sustained a preliminary injunction against enforcement of a Chicago ordinance that banned the sale of merchandise, including message-bearing T-shirts, in a large downtown park (Grant Park) and "a very wide buffer around the park." 125 F.3d at 1012. The Seventh Circuit expressed concern about the size of the "buffer" area around the park, but perceived no First Amend-

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[6] Petitioners' reliance (Pet. 14-15) on cases such as *Jamison* v. *Texas*, 318 U.S. 413 (1943), and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), is therefore misplaced. *Jamison* and *Murdock* establish that expressive activities otherwise within the ambit of the First Amendment, such as the distribution of religious literature, do not lose their First Amendment protection simply because they are undertaken in return for payment. The court of appeals expressly acknowledged that proposition. See Pet. App. 7 n.2 (noting "the long-established proposition that an expressive item does not lose its protection simply because it is sold").

ment problem with prohibiting sales activities in the park itself:

> What is questionable * * * is not the ordinance itself but rather the size of the district that the city council has designated as a no-peddling zone. * * * *It is one thing to ban peddlers, including * * * "First Amendment" peddlers, from Grant Park; it is another to ban the latter from the surrounding streets as well.* The necessity for, and hence the reasonableness of, so extensive a ban is questionable. *The case would be in a different posture if the designation had been limited to Grant Park, for then [the plaintiffs] could peddle their t-shirts to people entering and leaving the park.*

Id. at 1015-1016 (emphasis added). Here, the sales regulation permits petitioners to sell T-shirts along the streets and sidewalks adjacent to the Mall to people entering and leaving the park. The regulation at issue in the present case is therefore precisely the kind of regulation that the Seventh Circuit described as constitutionally unobjectionable. Indeed, the Seventh Circuit cited the decision of the court of appeals in this case with approval. See *id.* at 1016. Thus, far from conflicting with the decision here, *Ayres* directly supports it.

The Second Circuit's decision in *Bery*, like the Seventh Circuit's decision in *Ayres*, rests on the conclusion that a municipal sales regulation with broad geographic scope failed to preserve adequate opportunities for public expression. The regulation at issue in *Bery* prohibited the unlicensed sale of most goods and services, including works of art, in all "public spaces" in the City of New York, including all

parks, sidewalks, and other publicly owned land. 97 F.3d at 692. The regulation amounted to "a *de facto* bar preventing visual artists from exhibiting and selling their art in public areas in New York." *Id.* at 697. The Second Circuit held that the ordinance violated the First Amendment because the complete exclusion of art sales from public areas swept too broadly and did not leave artists with adequate alternative means to reach their desired audience. *Id.* at 697-698. At the same time, the court emphasized that New York could adopt narrower regulations regarding "where [artists] may exhibit their works" in order to avoid congestion and related problems. *Id.* at 697. Nothing in *Bery* casts doubt on the constitutionality of the sales regulation at issue here, which does not purport to exclude the sale of message-bearing T-shirts from all "public areas" in the District of Columbia and which permits such sales in areas immediately adjacent to the Mall.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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